(3)

Supreme Court, U.S.
FILED
AUG 9 - 2004
OFFICE OF THE CLERK

No. 04-27

In the Supreme Court of the United States

AMERICAN NATIONAL INSURANCE CO., MONUMENTAL LIFE INSURANCE CO., AND THE WESTERN & SOUTHERN LIFE INSURANCE CO.,

Petitioners,

v.

MATTIE BRATCHER, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

ROBIN S. CONRAD
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

DONALD J. RUSSELL*
ROY T. ENGLERT, JR.
MAX HUFFMAN
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICUS CURIAE* 1

STATEMENT 2

A. Rule 23 3

B. The Proceedings in This Case 7

SUMMARY OF THE ARGUMENT 11

ARGUMENT 12

I. The Decision Below Adds To the Conflict and Confusion in the Circuits Over the Permissible Use of Rule 23(b)(2) to Certify Classes Seeking Money Damages in Addition to Injunctive Relief 12

II. The Confusion Over These Issues, and the Overly Permissive Use of Rule 23(b)(2) Certification, Have Substantial and Recurring Implications for Litigants 15

III. The Decision Below Is Wrong 19

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

Cases

Allison v. *Citgo Petrol. Co.*, 151 F.3d 402 (5th Cir. 1998) 9, 10, 12, 13

Barabin v. *Aramark Corp.*, No. 02-8057, 2003 WL 355417 (3d Cir. Jan. 24, 2003) 13

Battle v. *Pennsylvania*, 629 F.2d 269 (3d Cir. 1980) 18

Brown v. *Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), cert. dismissed, 511 U.S. 117 (1994) 18

Califano v. *Yamasaki*, 442 U.S. 682 (1979) 17

Coleman v. *General Motors Acceptance Corp.* 296 F.3d 443 (6th Cir. 2002) 13, 17

Coopers & Lybrand v. *Livesay*, 437 U.S. 463 (1978) 16

Corley v. *Entergy Corp.*, — F.R.D. —, 2004 WL 1443896 (E.D. Tex. Jan. 27, 2004) 9

Deposit Guar Nat'l. Bank v. *Roper*, 445 U.S. 326 (1980) 20

Eisen v. *Carlisle & Jacqueline*, 52 F.R.D. 253 (S.D.N.Y. 1971) 17

Eubanks v. *Billington*, 110 F.3d 87 (D.C. Cir. 1997) 5, 10

Fox v. *Glickman Corp.*, 355 F.2d 161 (2d Cir. 1965) 3

TABLE OF AUTHORITIES (cont'd)

Page(s)

Great-West Life & Annuity Ins. Co. v. *Knudson*, 534 U.S. 204 (2002) 10

Hansberry v. *Lee*, 311 U.S. 32 (1940) 5

Holmes v. *Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983) 14, 17

In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig, 288 F.3d 1012 (7th Cir. 2002) 16

In re Jackson Nat'l Life Ins. Co. Premium Litig., 193 F.R.D. 505 (W.D. Mich. 2000) 7

Jefferson v. *Ingersoll Int'l Inc.*, 195 F.3d 894 (7th Cir. 1999) 3, 13, 20

Laskey v. *Int'l Union*, 638 F.2d 954 (6th Cir. 1981) 15

Lemon v. *Int'l Union of Operating Eng'rs*, 216 F.3d 577 (7th Cir. 2000) 13, 14

Molski v. *Gleich*, 318 F.3d 937 (9th Cir. 2003) . 9, 12, 13, 15

Murray v. *Auslander*, 244 F.3d 807 (11th Cir. 2001) 13

Ortiz v. *Fibreboard Corp.*, 527 U.S. 815 (1999) ..... *passim*

Parker v. *Time Warner Entertainment Co., L.P.*, 331 F.3d 13 (2d Cir. 2003) 12, 20

Phillips Petroleum Co. v. *Shutts*, 472 U.S. 797 (1985) 5, 14

Plummer v. *Chem. Bank*, 668 F.2d 654 (2d Cir. 1982) 14

TABLE OF AUTHORITIES (cont'd)

Page(s)

Rice v. *City of Philadelphia*, 66 F.R.D. 17 (E.D. Pa. 1974) 18

Robinson v. *Metro-North Commuter R.R.*, 267 F.3d 147 (2d Cir. 2001) 9, 12, 13

Smith v. *Swormstedt*, 16 How. 288 (1853) 18

Supreme Tribe of Ben Hur v. *Cauble*, 255 U.S. 356 (1921) 18

Ticor Title Ins. Co. v. *Brown*, 511 U.S. 117 (1994) ..... *passim*

Warth v. *Seldin*, 422 U.S. 490 (1975) 19

West v. *Prudential Sec., Inc.*, 282 F.3d 935 (7th Cir. 2002) 9

Statutes and Rules

Fed. R. Civ. P. 23 ..... *passim*

Fed. R. Civ. P. 23, Advisory Committee Notes 3, 4, 5

Miscellaneous

Marvin E. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39 (1967) 4

HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW (1973) 15, 16, 17

George Rutherglen, *Better Late Than Never: Notice and Opt Out at the Settlement Stage of Class Actions*, 71 N.Y.U. L. REV. 258 (1996) 7

George Rutherglen, *Notice, Scope, and Preclusion in Title VII Class Actions*, 69 VA. L. REV. 11 (1983) 5

WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE (1986) 18

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States (the Chamber) is a nonprofit corporation organized under the laws of the District of Columbia and is the world's largest business federation. The Chamber represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community.

Chamber members routinely are named as defendants in litigation in which plaintiffs seek class certification, including certification of injunctive-relief classes under Rule 23(b)(2). Because of its extensive experience in these matters, the Chamber is well situated to brief this Court on the importance of the issues, beyond the immediate concerns of the parties to the litigation, to companies collectively responsible for a substantial portion of total U.S. economic activity

The Chamber takes no position on the merits of the underlying action. But the Chamber emphatically agrees with petitioners that a grant of certiorari is needed to clear up the confusion over the proper standards for certifying a class under Fed. R. Civ. P. 23(b)(2). Beyond the intolerable confusion and

---

[1] The parties' letters of consent to the filing of this brief have been lodged with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation and submission of this brief.

inconsistency generated by the longstanding circuit split on this issue, the decision below rests on an incorrect and overly permissive view of the requirements for certifying a class under Rule 23(b)(2), and threatens to lead to the improper certification of classes in many cases.

The confusion and inconsistency in the cases threaten severe negative consequences for the Chamber's members and for the public. Class certification can transform a modest case into one with thousands or millions of claimants and billions of dollars in damages, while depriving defendants of the opportunity to expose the legal and factual shortcomings of individual claims for liability or damages. Improper class certifications generate overwhelming pressure on defendants to settle cases, *regardless of the merits*, because defendants simply cannot "bet the company" on a single jury verdict, even if they believe there is an overwhelming likelihood that they will win a trial on the merits. These concerns are exacerbated when certification is allowed under Rule 23(b)(2), because that provision does not contain the important procedural protections found in Rule 23(b)(3). For these reasons, the Chamber and its members have a strong interest in promoting adherence to the strict requirements of Rule 23. In any event, Chamber members need a consistent rule to enable them to order their behavior with full knowledge of the litigation risks.

STATEMENT

This case presents the Court with an excellent opportunity to decide a question that has generated substantial confusion in the circuits: What standards are to be applied when plaintiffs seek to certify class actions seeking both injunctive relief *and* damages? Fed. R. Civ. P. 23(b)(2) permits a class action if the defendant "has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final *injunctive* relief * * * with respect to the class as a whole" (emphasis added). Fed. R. Civ. P. 23(b)(3) permits damages class actions if careful analysis shows that class treatment is appropriate. The language of Rule 23(b) is clear on its face:

actions that do not meet the requirements of any of (b)(1), (b)(2), or (b)(3) are not permitted. However, one passage in the commentary to the 1966 amendments to Rule 23 has been invoked to justify an entire new category of class actions – actions seeking injunctive relief *and* money damages, in which "the appropriate final relief" does not "relate[] exclusively or predominantly to money damages." Fed. R. Civ. P. 23, Advisory Committee Notes.

In *Ticor Title Ins. Co.* v. *Brown*, 511 U.S. 117 (1994), this Court considered the standards for certification under the injunction provision of the Rule – (b)(2) – of classes seeking monetary as well as injunctive relief. That case, however, presented only the constitutional question whether awarding money damages without requiring notice and an opportunity for class members to opt out of the litigation violated the due process rights of absent class members. *Id.* at 120-121. The Court dismissed the writ as improvidently granted, preferring to wait for an opportunity to "resolve the preliminary nonconstitutional question" – whether classes seeking money damages can be certified at all under Rule 23(b)(2), which does not provide an opt-out right – "before proceeding to the constitutional claim." *Id.* at 121. This Court still has not decided that issue. See *Jefferson* v. *Ingersoll Int'l Inc.*, 195 F.3d 894, 897 (7th Cir. 1999) ("It is an open question * * * in the Supreme Court * * * whether Rule 23(b)(2) *ever* may be used to certify a no-notice, no-opt-out class when compensatory or punitive damages are in issue.") (emphasis in original). By granting the petition in this case, the Court can decide the issue *Ticor Title* left unresolved.

A. Rule 23

Promulgated in 1937 and amended three times since – in 1966, 1988, and 2003 – Fed. R. Civ. P. 23 governs class actions in federal courts. Most pertinent to this case are the 1966 amendments, promulgated in response to the general belief that the rule needed reforming. See, *e.g.*, *Fox* v. *Glickman Corp.*, 355 F.2d 161, 162 (2d Cir. 1965) (Friendly, J.) (noting the "desirability of amending Rule[] 23"). Even immediately after

the amendments, however, it was noted that "[t]he Rule * * * tends to ask more questions than it answers." Marvin E. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 39 (1967). This case demonstrates that Judge Frankel's observation remains true today.

Rule 23(b) defines the types of "Class Actions Maintainable." Two types are relevant here. First there is the 23(b)(2) class, which can be certified

> if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> * * * * *
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Fed. R. Civ. P. 23(b)(2). This type of class action was intended primarily for civil-rights lawsuits, "where a party is charged with discriminating unlawfully against a class." Fed. R. Civ. P. 23, Advisory Committee Notes. A class certified under Rule 23(b)(2) is a "mandatory" class action, because the rule "does not provide for absent class members to receive notice and to exclude themselves from class membership as a matter of right." *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 834 n.13 (1999) (discussing the 23(b)(1) "limited fund" class action).

Rule 23 also provides for certification of classes in which

> the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Fed. R. Civ. P. 23(b)(3). Like a 23(b)(2) class, a class certified under 23(b)(3) must satisfy the requirements of subdivision (a). In addition, Rule 23(b)(3) lists four non-exclusive "matters

pertinent to the findings" of predominance and superiority: (1) class members' interest in pursuing individual actions; (2) the extent of litigation already commenced by class members; (3) the desirability of hearing all the claims in one forum; and (4) the management difficulties for the class action. Fed. R. Civ. P. 23(b)(3)(A)-(D); see Advisory Committee Notes. If a class is certified under Rule 23(b)(3), "the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). The notice must state the right of class members to opt out of the litigation. *Ibid.*[2]

The basic distinction between injunctive-relief classes under Rule 23(b)(2) and damages classes under Rule 23(b)(3) is plain enough on paper, but in practice the two categories have not been treated as mutually exclusive. See *Eubanks* v. *Billington*, 110 F.3d 87, 92-93 (D.C. Cir. 1997) (noting that classes may meet the requirements of certification under both provisions). Lower courts have held that individual compensatory relief may be available in 23(b)(2) actions, along with injunctive relief against classwide discrimination. See *id.* at 93 ("The Advisory Committee foresaw neither the surge in filings of Title VII class actions nor decisions that award individual compensatory relief based on findings of classwide discrimination.'") (quoting George Rutherglen, *Notice, Scope, and Preclusion in Title VII Class Actions*, 69 VA. L. REV. 11, 25 (1983)).

This Court repeatedly has noted the tension between the class action rule and absent class members' due process rights, which prevent a person from being "'bound by a judgment *in personam* in a litigation in which he is not designated a party or to which he has not been made a party by service of process.'"

---

[2] Notice is permitted, but not required, in classes certified under Rule 23(b)(2), and the rule does not mention opt-out rights for (b)(2) classes. See Fed. R. Civ. P. 23(c)(2)(A); (d)(2).

Ortiz, 527 U.S. at 846 (quoting *Hansberry* v. *Lee*, 311 U.S. 32, 40 (1940)). For example, in *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 811-812 & n.3 (1985), this Court noted the necessity of procedural protections to safeguard the due process rights of absent class members who have claims for monetary relief:

> The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. * * * Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class * * *.

In *Ticor Title*, the Court granted certiorari on the question whether "'a federal court may refuse to enforce a prior federal class action judgment * * * on grounds that absent class members have a constitutional due process right to opt out of any class action which asserts monetary claims on their behalf.'" 511 U.S. at 120-121 (quoting the petition). The Court noted that there was a substantial non-constitutional question whether Rule 23(b)(1) and Rule 23(b)(2) permitted classes seeking monetary relief at all. *Id.* at 121. If the rule were interpreted to preclude money damages, the due process issue presented by the petition would be avoided. *Ibid.* The Court therefore dismissed the writ as improvidently granted. *Id.* at 122.

Dissenting from the decision to dismiss the writ, three Justices noted that "the lower courts have consistently held that the presence of monetary damages does not preclude class certification under Rules 23(b)(1)(A) and (b)(2)," but added that the correctness of those decisions was "a question we need not * * * decide today." 511 U.S. at 124 (O'Connor, J., joined by Rehnquist, C.J.,and Kennedy, J.). The dissent pointed out that lower courts continued to certify classes seeking monetary relief under (b)(1) and (b)(2), and, "[u]nless and until a contrary rule is adopted, courts will continue to certify classes under Rules 23(b)(1) and 23(b)(2) notwithstanding the presence of damages claims." *Ibid.*

B. The Proceedings in This Case

This case is another implicating the "awkward mismatch between the subdivisions under which class actions are certified and the procedural protections to which a class is entitled." George Rutherglen, *Better Late Than Never: Notice and Opt Out at the Settlement Stage of Class Actions*, 71 N.Y.U. L. REV. 258, 260 (1996). Respondents represent a putative class of "[a]ll African Americans who own, or owned at the time of policy termination, an industrial life insurance policy that was issued as a substandard plan or at a substandard rate." Pet. App. 51a. Respondents sought certification of this class under Rule 23(b)(2), arguing that "they are primarily seeking equitable relief." *Ibid.* Nevertheless, respondents also seek "restitution of past premium overcharges or benefit underpayments." *Id.* at 54a.

1. The district court denied certification under Rule 23(b)(2), holding that "the request for relief is primarily and in actuality in the form of monetary relief." Pet. App. 55a. This is because only some plaintiffs could realize a benefit from injunctive relief; "the defendants no longer sell so-called industrial life insurance." *Ibid.* The injunctive relief sought by respondents was therefore "'designed primarily to facilitate and ensure the satisfaction of any monetary relief the Court might award.'" *Id.* at 56a (quoting *In re Jackson Nat'l Life Ins. Co. Premium Litig.*, 193 F.R.D. 505, 509 (W.D. Mich. 2000)). "[M]any * * * proposed class members * * * would not benefit in any way from the injunctive relief requested, and thus, the request for declaratory relief only serves to bootstrap a more genuine interest in an award of monetary damages." *Id.* at 54a. The district court held that, because monetary relief predominated over injunctive relief, certification under 23(b)(2) was improper.

In addition to holding that the proposed class failed the predominance test for 23(b)(2) certification, the district court noted that the class was not adequately cohesive for certification under that provision. Pet. App. 56a. It noted the existence of some

280 different insurance companies that had issued policies now administered by the three defendants. "[A]ll had different underwriting and pricing procedures, involving perhaps a million policy holders." *Ibid.* Other potential disparities included (*id.* at 56a-57a):

> 1) the plaintiff's age at the time the policy was issued; 2) whether the policy had built in benefits, such as a loss of limb benefit; 3) whether the premium as calculated was race-neutral; and 4) whether any dividends were paid on any policies. The Court would also have to consider the policies that had lapsed or that had been adjusted by defendants. There would need to be a determination of which policies had been adjusted, the amount of the adjustment and whether the adjustment was sufficient.

Additionally, defendants argued the possibility of a statute-of-limitations defense that would vary from plaintiff to plaintiff, based in part on the application of notice rules. *Id.* at 57a-58a.

2. The Fifth Circuit reversed over a dissent by Judge Clement. A petition for rehearing was denied, and the panel issued a revised opinion, with Judge Clement again dissenting. The court noted the primary factual dispute over what percentage of the possible class members was seeking injunctive, versus monetary, relief. Because "as early as 1988[] some insurers voluntarily adjusted premiums and/or death benefits to equalize the amount of coverage per premium dollar," and because "[i]t is undisputed that all companies that sold dual rate or dual plan policies have not done so since the early 1970's" (Pet. App. 5a), many purported class members could gain nothing from injunctive relief (which might, for example, order equitable adjustment of any existing policies). In fact, "[d]efendants' expert estimates that the ratio of terminated policies to outstanding policies is approximately five to one, meaning that slightly more than one million policies remain in force." *Ibid.* Plaintiffs' expert testified differently: "over 4.5 million of the 5.6 million industrial policies issued by defendants remain in-force." *Ibid.*

The panel majority held that "'determining whether one form of relief actually predominates in some quantifiable sense is a wasteful and impossible task that should be avoided.'" Pet. App. 10a (quoting *Allison* v. *Citgo Petrol. Co.*, 151 F.3d 402 (5th Cir. 1998)).[3] Instead, although the court noted that monetary relief is essentially individual in nature (Pet. App. 11a ("[o]nce monetary damages enter the picture, however, class cohesiveness is generally lost")), it held that whether monetary relief was the "prime goal" was irrelevant to the (b)(2) certification analysis. *Id.* at 10a. In so holding, the court noted the direct split with the Second and Ninth Circuits, both of which condition (b)(2) certification on the "intent of the plaintiffs in bringing suit." *Molski* v. *Gleich*, 318 F.3d 937, 950 (9th Cir. 2003); see *Robinson* v. *Metro-North Commuter R.R.*, 267 F.3d 147, 163-164 (2d Cir. 2001). The court then held – citing plaintiffs' 4.5 million figure[4] – that "the proportion" "of class members continuing to pay discriminatory premiums * * * is sufficient" to deem the class to be seeking injunctive relief. Pet. App. 12a.

The majority then addressed the question of notice and opt-out, which some courts have held are permitted, but not required, when a class is certified under Rule 23(b)(2). See pp.

---

[3] The holding below already has been interpreted to mean that a court should not conduct a predominance analysis when faced with a request for certification under 23(b)(2) of a class seeking both injunctive relief and money damages. See *Corley* v. *Entergy Corp.*, — F.R.D. —, 2004 WL 1443896, at *6 n.9 (E.D. Tex. Jan. 27, 2004) (holding that a predominance analysis is unnecessary and citing the Fifth Circuit decision in this case).

[4] If the panel majority thought itself bound to accept plaintiffs' allegations and expert testimony at the class certification stage, it placed itself in conflict with a line of cases from other circuits exemplified by *West* v. *Prudential Sec., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002) (certifying a class without resolving a "clash" between each side's experts "amounts to a delegation of judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert").

4-5, *supra*; *Eubanks*, 110 F.3d at 94 (district courts have discretion to grant opt-out rights for (b)(2) classes). But see note 8, *infra*. In this case, the court held that "class members must be provided adequate notice" if the class was certified, and "the district court should consider the possibility of opt-out rights." Pet. App. 13a. To justify that holding, the court noted that "the rule 23(b)(2) predominance requirement, by focusing on uniform relief flowing from defendants' liability, 'serves essentially the same functions as the procedural safeguards and efficiency and manageability standards mandated in (b)(3) class actions.'" *Id.* at 14a (quoting *Allison*, 151 F.3d at 414-415).

Finally, the panel majority discussed the complications of calculating the individualized monetary damages, which are distinct from backpay the court understood to be designated by Title VII as equitable in nature,[5] and the possibility that the statute-of-limitations defenses differed from plaintiff to plaintiff. It concluded that calculation of damages would be "'a mechanical task,'" and that questions concerning constructive notice that might trigger the statute of limitations could be determined on a nationwide and classwide basis. Pet. App. 15a-21a.

Judge Clement argued in dissent that the majority ignored the applicable standards of review. Pet. App. 22a-24a. She noted that the district court's determination that monetary relief predominated over injunctive relief was a factual finding. "In setting aside these factual findings, the majority fails to show that the district court has committed clear error." *Id.* at 22a.

---

[5] But cf. *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 218 n.4 (2002) ("Congress 'treated backpay as equitable' in Title VII only in the narrow sense that it allowed backpay to be awarded *together with* equitable relief * * *.") (citation omitted; emphasis in original).

SUMMARY OF THE ARGUMENT

The holding of the Fifth Circuit below is in conflict with other courts of appeals on two distinct grounds, both of which are encompassed within the question presented by the petition for certiorari. The first conflict concerns the application of the standard described in the Advisory Committee Notes to Rule 23(b)(2) requiring that the appropriate final relief not relate "exclusively or predominantly" to money damages. Although the district court had held that the primary motivation of the plaintiffs in bringing suit was money damages – which likely would defeat certification in the Second and Ninth Circuits – the court of appeals held that plaintiffs' motivation was irrelevant. The court also held that opt-out rights are discretionary when a class is certified under Rule 23(b)(2). This holding conflicts with decisions of other courts, holding that Rule 23(b)(2) does not permit class members to opt out.

The implications of overuse of the 23(b)(2) certification provision are significant. Class actions are already exceptionally – in our view excessively – powerful weapons for plaintiffs and their counsel. They become even more so when the procedural protections that govern damages class actions under Rule 23(b)(3) are ignored by certifying instead under (b)(2). If the availability of Rule 23(b)(2) certification is to be expanded so significantly, the decision should be made by this Court, and not by the courts of appeals. In any event, the rule must be applied consistently nationwide.

The question of an opt-out right in damages actions brought under (b)(2), which was arguably present in *Ticor Title*, but which the Court decided was not squarely presented, raises substantial due process concerns for absent class members. It also raises important concerns of repose – the most important benefit of Rule 23(b)(2) class actions, according to Judge Friendly – for defendants, because of the risk that a settlement or verdict may be attacked collaterally by absent class members who claim that their due process rights were ignored (as did the *Ticor Title*

respondents). This case presents the Court with the opportunity to clarify this important issue.

The decision below also is wrong. It operates to liberalize the standard for certifying classes seeking money damages under Rule 23(b)(2) to a degree that cannot be squared with the rule itself. Review by this Court is needed to correct that important error on a frequently recurring issue, cleanly presented in this case.

ARGUMENT

I. The Decision Below Adds To the Conflict and Confusion in the Circuits Over the Permissible Use of Rule 23(b)(2) to Certify Classes Seeking Money Damages in Addition to Injunctive Relief

A. A deep and entrenched conflict has developed in the circuits over the application of Rule 23(b)(2) in cases such as this one, where plaintiffs seek monetary damages in 23(b)(2) class actions. This conflict has produced, and continues to produce, substantial confusion, and calls for resolution by this Court. The split among the circuits, with at least two different rules for treatment of these hybrid class actions, is detailed in the petition. Pet. 14-20. On one side of the conflict are the courts holding that the subjective motivation of plaintiffs seeking certification – whether they are actually seeking injunctive or monetary relief – should be analyzed to determine whether monetary relief predominates over injunctive relief. See *Molski*, 318 F.3d at 950; *Robinson*, 267 F.3d at 163-164. Judges in those circuits have recognized the conflict. See *Parker* v. *Time Warner Entertainment Co., L.P.*, 331 F.3d 13, 23 (2d Cir. 2003) (Newman, J., concurring) ("this Court has rejected the Fifth Circuit's limitation of (b)(2) to claims for 'incidental' damages, * * * outlining instead a broader 'ad hoc' approach"); *Molski*, 318 F.3d at 949 ("we refuse to adopt the approach set forth in *Allison*").

Markedly different in approach are the courts that have followed the *Allison* test, which states that "monetary relief predominates in (b)(2) class actions unless it is incidental to

requested" equitable relief, and defines "incidental" by asking whether the damages "flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief." *Allison*, 151 F.3d at 415 (emphasis in original). At least the Sixth, Seventh, and Eleventh Circuits have joined the Fifth Circuit on this side of the basic conflict. See *Coleman* v. *General Motors Acceptance Corp.*, 296 F.3d 443, 446-447 (6th Cir. 2002); *Jefferson*, 195 F.3d at 898 (adopting a narrow "incidental to the equitable remedy" approach to certification of class actions seeking monetary relief); *Lemon* v. *Int'l Union of Operating Eng'rs*, 216 F.3d 577, 579 (7th Cir. 2000) (reversing (b)(2) certification because monetary relief was not incidental); *Murray* v. *Auslander*, 244 F.3d 807, 812 (11th Cir. 2001) ("incidental damages will, by definition, be more in the nature of a group remedy, consistent with the forms of relief intended for (b)(2) class actions"). One panel of the Third Circuit has followed the *Allison* approach as well in an unpublished opinion. See *Barabin* v. *Aramark Corp.*, No. 02-8057, 2003 WL 355417, at *2 (3d Cir. Jan. 24, 2003) (adopting the *Allison* test for predominance, but also citing *Molski* and *Robinson* favorably).

Though the motivation test of the Second and Ninth Circuits is often more favorable to plaintiffs seeking (b)(2) class certification than is the *Allison* test, in this case the opposite is true: both the district court and the court of appeals accepted that the plaintiffs were more interested in monetary relief than in injunctive relief – so in the Ninth and Second Circuits, the plaintiffs in this case seemingly could *not* have obtained certification under Rule 23(b)(2). In addition, as the application of the *Allison* test by the panel majority below indicates, that test is itself manipulable: a true focus on whether the monetary relief sought is *incidental* – the part of the test the Seventh Circuit emphasizes – would surely have resulted in affirmance of the district court's denial of class certification, but the panel majority was able to reverse by focusing instead on the *Allison* panel's redefinition of the word "incidental" to mean "flow[ing] directly from liability to the class *as a whole* on the claims

forming the basis of the injunctive or declaratory relief." Pet. App. 15a-16a. By granting review in this case and reversing under *either* the Second/Ninth Circuit test emphasizing motivation or the Seventh Circuit test emphasizing the incidental nature of monetary relief, this Court could greatly improve the clarity and uniformity of the law nationwide, while also confining Rule 23(b)(2) more closely to its intended purpose.

B. In addition to the confusion on the appropriate standard for certification of class actions seeking both monetary and injunctive relief under 23(b)(2), this case presents the Court with an excellent opportunity to clarify the confusion over class members' right to opt out of classes certified under (b)(2). In 1983, the court in *Holmes* v. *Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983), recognized the existence of a circuit split on the question of opt-out rights, which "reflect[s] a tension between the policy of facilitating antidiscrimination class actions and the need to protect the rights of absent class members." *Id.* at 1153 (citing cases); see also *Plummer* v. *Chem. Bank*, 668 F.2d 654, 657 n.2 (2d Cir. 1982) (citing cases). The *Holmes* court also noted: "the United States Supreme Court has not yet decided whether opting out of (b)(2) classes is ever permissible." 706 F.2d at 1153. Despite having touched on it three times (in *Ortiz*, 527 U.S. at 844-848, *Ticor Title*, 511 U.S. at 121, and *Shutts*, 472 U.S. at 811-812), this Court still has not decided that question.

In this case, the court of appeals held that "the district court should consider the possibility of opt-out rights." Pet. App. 13a. However, while mandating notice to absent class members under Rule 23(d)(2), the court treated opt-out rights as discretionary, although even by the court of appeals' count, between one and 4.5 million class members could realize *only* monetary relief. See pp. 8-9, *supra*. The Seventh Circuit appears to follow a very similar approach. *Lemon*, 216 F.3d at 582 (discussing the district court's "plenary authority under Rules 23(d)(2) and 23(d)(5) to provide all class members with personal notice and opportunity to opt out"). The Sixth Circuit

has stated a highly permissive standard – recommending that a district court certify a class under (b)(2) rather than (b)(3) *specifically because of* the lack of an opt-out requirement in the rule. See *Laskey* v. *Int'l Union*, 638 F.2d 954, 956-957 (6th Cir. 1981).

The Ninth Circuit, by contrast, recently has taken a harder line, holding that opt-out rights must be made available "when substantial monetary damages are involved." *Molski*, 318 F.3d at 948. It is, of course, no answer to the due process concern that some – but not all – of the circuits require the opportunity to opt out of a (b)(2) class. This case presents the Court with the opportunity to address the substantial due process question left unresolved in *Ticor Title*. See Pet. 18-20. The Court may wish to consider that constitutional question either in the course of interpreting the Rule so that it may apply the doctrine of constitutional avoidance (see *Ortiz*, 527 U.S. at 845), or in dictating further proceedings if the Court first concludes that Rule 23(b)(2) does permit class actions seeking monetary relief. Either way, a grant of certiorari in this case would present the opportunity to give much-needed guidance to the lower courts on an important matter with respect to which those courts are reaching starkly inconsistent results.

II. The Confusion Over These Issues, and the Overly Permissive Use of Rule 23(b)(2) Certification, Have Substantial and Recurring Implications for Litigants

A. The 1966 amendments to Rule 23 "greatly augmented the volume of private litigation" through the "expanded concept of the class action." HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 118 (1973). Judge Friendly "perceived few grounds for serious criticism of Rule 23(b)(2)" because "[t]he relief sought is generally an injunction or decree." *Ibid.* Indeed, if *injunctive* relief is sought, Judge Friendly viewed the primary benefit of a (b)(2) class action as being the "benefit [to a] successful defendant in preventing further litigation," because

an injunction – in practical effect, if not in legal reality – operates to the benefit of parties not before the court. *Ibid.*

Judge Friendly did not express such positive sentiments with regard to classes certified under Rule 23(b)(3), "what would have been a 'spurious' class action." FRIENDLY, FEDERAL JURISDICTION, *supra*, at 119. The evils attendant upon careless certification of class actions have been much discussed and are well documented. The cost of litigating large class actions and the risk of catastrophic damages in the event of a loss create irresistible pressures on defendants to settle, even when they have meritorious defenses or the plaintiffs' claims are weak. See *id.* at 119-120. This Court has recognized that "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978). The larger the class, the greater the pressure on defendants, such that, when vast numbers of claims are aggregated, "settlement becomes almost inevitable – and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims." *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig*, 288 F.3d 1012, 1016 (7th Cir. 2002). Judge Friendly described this phenomenon as the "blackmail settlement." FRIENDLY, FEDERAL JURISDICTION, *supra*, at 120.

Although sanguine about injunctive relief class actions, Judge Friendly was highly skeptical of the device as a means of gathering a multitude of *de minimis* monetary claims – essentially what the court below termed the "negative value class action." Pet. App. 3a. "Something seems to have gone radically wrong with a well-intentioned effort * * *. This is a matter that needs urgent attention." FRIENDLY, FEDERAL JURISDICTION, *supra*, at 120.

B. Writing in 1973, Judge Friendly did not have occasion to remark on the phenomenon illustrated by this case – damages actions certified under the more permissive standards that gov-

ern actions for injunctive relief, 23(b)(2). The opportunities for abuse in 23(b)(3) class actions seeking predominantly money damages are magnified when classes seeking damages are certified under 23(b)(2). As this Court has noted, "the limitations on class sizes associated with 23(b)(3) actions do not apply" to classes certified under 23(b)(2). *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979). "Nor is a nationwide class" certified under 23(b)(2) "inconsistent with principles of equity jurisprudence." *Ibid.* Furthermore, the stringent procedures that must be followed to certify a class under 23(b)(3) provide some check on abuse of *that* procedure, but are not present when the class is certified under 23(b)(2). See pp. 4-5, *supra*. "These procedural protections are considered unnecessary for a Rule 23(b)(2) class because its requirements are designed to permit only classes with homogenous interests." *Coleman*, 296 F.3d at 447 (citing *Holmes*, 706 F.2d at 1155-1156).

The inevitable consequence of the approach followed by the panel majority below would be the certification of much larger damages classes than is possible if courts respect the distinction between 23(b)(2) and 23(b)(3). Judge Friendly gave one example that he specifically decried – a six-million-member Rule 23(b)(3) class in which each class member stood to recover less than $4. FRIENDLY, FEDERAL JURISDICTION, *supra*, at 119 (citing *Eisen* v. *Carlisle & Jacquelin*, 52 F.R.D. 253 (S.D.N.Y. 1971)). But, because it was certified under 23(b)(3), that class at least was subjected to considerations of predominance and superiority before it was certified. In the case before the Court, almost precisely the same situation is presented: a million-plus-member class, in which each member stands to recover a very small dollar amount, was held to be properly certifiable. See Pet. App. 51a-52a n.1; *id.* at 3a & n.1. But in this case, because certification is sought under Rule 23(b)(2), the important checks of common issues predominating over individual issues and superiority of the class action device – as well as the require-

ment of notice to absent class members and right to opt out of the class – are not present.[6]

C. Certifications of classes seeking money damages under Rule 23(b)(2) present the risk of substantially prejudicing class-action defendants. Absent class members will seek to relitigate settlements or verdicts if they find them unfavorable. Defendants will be unable to rely on the finality usually offered by the class-action device, because of the risk that absent class members will claim that it is a violation of due process to foreclose their right to individual suits. See *Brown* v. *Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992) (refusing to bind an absent class member to the *res judicata* effect of a class settlement), cert. dismissed, 511 U.S. 117 (1994).

In *Smith* v. *Swormstedt*, 16 How. 288 (1853), in an opinion written by Justice Story – "credited with having formulated the standards [for class actions] in this country" (7A WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 1751, at 10 (1986)) – this Court held that "the decree binds all [class members] the same as if all were before the court." 16 How. at 303. In *Supreme Tribe of Ben Hur* v. *Cauble*, 255 U.S. 356, 367 (1921), this Court held that "[i]f the decree is to be effective and conflicting judgments are to be avoided, all of the class must be concluded by the decree." And, as noted above, Judge Friendly saw repose as the primary benefit of the equitable class action under Rule 23(b)(2). See pp. 15-16, *supra*. This most important policy of repose will be undermined if courts certify damages class actions under Rule 23(b)(2).

---

[6] The panel majority below noted other factors that increased its flexibility in the (b)(2) context. "'Where the class action seeks only injunctive or declaratory relief for which the notice provision of Fed. R. Civ. P. 23(c)(2) is not mandatory, the district court has even greater freedom in both the timing and specificity of its class definition.'" Pet. App. 6a n.6 (quoting *Battle* v. *Pennsylvania*, 629 F.2d 269, 271 n.1 (3d Cir. 1980). Also, "'[t]he precise definition of the (b)(2) class is relatively unimportant.'" Pet. App. 6a n.6 (quoting *Rice* v. *City of Philadelphia*, 66 F.R.D. 17, 19 (E.D. Pa. 1974)).

III. The Decision Below Is Wrong

The decision below is indefensible in light of the plain language of Rule 23(b)(2), as well as the policies underlying the rule and this Court's few pronouncements on its effect.[7] Rule 23(b)(2) is plain on its face, and applies to injunctive relief class actions: "thereby making appropriate *final injunctive relief* or *corresponding declaratory relief* with respect to the class as a whole" (emphasis added). The court of appeals below characterized such an interpretation – which would require certification of the highly individualized claims for money damages in this case, if certification could be had at all, under Rule 23(b)(3) – as "elevat[ing] form over substance." Pet. App. 14a. Respectfully, that is not so. As the preceding discussion indicates (pp. 15a-19a, *supra*), the formal distinctions between (b)(2) and (b)(3) classes exist to protect important substantive goals. As one judge recently noted (*Parker*, 331 F.3d at 24 (Newman, J., concurring) (quoting Fed. R. Civ. P. 23(b)(3)):

> I question whether we risk unduly extending (b)(2) in cases with monetary claims by inviting district judges to use it and then protect claimants with individualized damage amounts either by affording them opt-out rights or certifying only the liability issue. Such devices strike me as a way of undermining the (b)(3) requirement that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

---

[7] This case implicates an additional question whether class representatives who may or may not have damages claims properly can represent those class members who do have such claims. While this Court has recognized representative standing in the context of claims for injunctive relief, in damages claims, a party who has suffered no monetary injury cannot sue on behalf of a party that has. See *Warth* v. *Seldin*, 422 U.S. 490, 515 (1975) (comparing associational standing in injunctive relief cases to classes certified under Rule 23(b)(2)). See also *Ortiz*, 527 U.S. at 830-831 (Rule 23 "'must be interpreted in keeping with Article III constraints'") (quoting *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 612-613 (1997)).

In addition, this Court's authorities make clear that, as a matter of due process, opt-out rights must be made available to absent class members seeking money damages. See, *e.g.*, *Ortiz*, 527 U.S. at 848. The court of appeals below held that opt-out rights were *discretionary* (Pet. App. 13a) – thus permitting the certification of a damages class action that could bind millions of absent class members to a one-size-fits-all award that may not properly reflect differences among their claims. The error will not be cured simply by requiring opt-out rights in this case.[8] Instead, the rule's failure to make opt-out mandatory for (b)(2) classes, as it does for (b)(3) classes, should be interpreted to preclude the use of (b)(2) certification for classes seeking damages that are not truly incidental (for example, as defined by the Seventh Circuit in *Jefferson*, 195 F.3d at 898).

* * * * *

Chief Justice Burger, writing for the Court, noted the "potential for misuse of the class action mechanism," under which the "benefits to class members are often nominal and symbolic, with persons other than class members becoming the chief beneficiaries." *Deposit Guar Nat'l. Bank* v. *Roper*, 445 U.S. 326, 339 (1980). That problem, and the continuing confusion created by persistent circuit splits, can be addressed in this case by resolving the question that the Court could not reach in *Ticor Title*, but that is squarely presented for review in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

---

[8] Indeed, it is not clear that opt-out rights are *permitted* in a class certified under Rule 23(b)(2). Rule 23 discusses only discretionary notice requirements and permissive intervention. See Fed. R. Civ. P. 23(c)(2)(A), (d)(2). Permitting plaintiffs to opt out of (b)(2) classes would undermine what Judge Friendly viewed as the primary benefit of that form of certification. See pp. 15-16, *supra*.

Respectfully submitted.

ROBIN S. CONRAD
National Chamber
Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

DONALD J. RUSSELL
Counsel of Record
ROY T. ENGLERT, JR.
MAX HUFFMAN
Robbins, Russell, Englert,
Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

AUGUST 2004